Supreme Court, U.S.
FILED
FEB 7 2002

(3)

No. 01-724

In The

Supreme Court of the United States

THOMAS J. CAPANO,

Petitioner,

v.

STATE OF DELAWARE,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Delaware

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF OF RESPONDENT IN OPPOSITION

The Attorney General of Delaware, on behalf of the State of Delaware, respectfully submits the following in response to the petition for a writ of certiorari to review the judgment of the Delaware Supreme Court in this case.

OPINIONS BELOW

The opinion of the Delaware Supreme Court (Pet. App. A1-A239) is officially reported at 781 A.2d 556.

STATEMENT

In December 1997, a Delaware state grand jury indicted petitioner Thomas J. Capano, charging him with having committed first degree murder in the death of Anne Marie Fahey. After a 10-week trial, a Superior Court jury found petitioner guilty of first degree murder. Following a penalty hearing, the jury recommended by a vote of 10 to 2 that petitioner be sentenced to death. In March 1999, the trial judge sentenced petitioner to death. On appeal, the Delaware Supreme Court affirmed the conviction and the sentence. Pet. App. A1-A239.

1. Petitioner, a prominent local attorney, and Anne Marie Fahey began dating in the spring of 1994. The two kept the relationship a secret from most of their friends and family members. Fahey was in love with petitioner, but she knew that she could not expect to marry him. By September 1995, when Fahey met Michael Scanlon, she was attempting to end the relationship with petitioner.

Petitioner, however, became very upset and continued to pursue the relationship. On her part, Fahey was concerned that petitioner would react badly if he learned of her increasingly close ties to Scanlon, Fahey telling her psychiatrist that she felt petitioner was controlling her. By April 1996, Fahey thought that she and petitioner had established a friendship that she could manage while increasing her involvement with Scanlon. Pet. App. A12-A14, A92-A94, A96-A99.

In the meantime, according to prosecutors, petitioner had started to plan Fahey's demise. In February 1996, petitioner told two of his brothers, Gerry and Joseph, that he had been threatened by extortionists, and he borrowed $8,000 from Gerry in connection with the extortion effort. Petitioner later obtained a pistol from Gerry (which petitioner returned about a month later) and asked Gerry if he could borrow Gerry's boat if he had to dispose of a body. In April 1996, petitioner purchased a 162-quart marine cooler that was later used to dispose of Fahey's body. The following month, petitioner had his mistress of 17 years, Deborah MacIntyre, purchase a handgun for him. Pet. App. A14, A49-A53, A56-A58.

2. On Thursday, June 27, 1996, Fahey left work at about 4:30 p.m. and went to an appointment with her psychiatrist. Petitioner and Fahey later had dinner at a Philadelphia restaurant, and Fahey was never seen alive thereafter. Early the next morning, petitioner asked Gerry if he could borrow his boat. According to Gerry, when he asked petitioner, "Did you do it?", petitioner replied that he had. The two agreed to meet later at petitioner's house. Pet. App. A15.

When Gerry arrived at about 8:30 a.m., petitioner had secured the cooler with a lock and chain which Gerry told him to remove. The two placed the cooler in the back of petitioner's sports utility vehicle, and they drove to Gerry's house in Stone Harbor, New Jersey. There, they put the cooler onto Gerry's boat and proceeded to sea. At about 60 miles from the coast, they pushed the cooler over the side. The cooler, however, simply floated and continued to do so even after Gerry shot a hole in it. Gerry eventually maneuvered the boat alongside the cooler but, after giving petitioner two anchors, turned away as petitioner wrapped Fahey's body in the chain and weighed it down with the anchors. Gerry looked back in time to see part of a human leg sink into the water. He retrieved the cooler from the water, rinsed out the inside, and removed the lid before tossing the cooler and the lid back into the ocean.[1] Back at petitioner's house, the two disposed of a bloodstained love seat and rug from the great room of the house; on Saturday, June 29, petitioner bought a new rug. Pet. App. A15-A16, A47-A48, A59-A60.

That Saturday night, Fahey did not appear at a family dinner, and after contacting some of her friends and entering her apartment, Fahey's family contacted police. Investigators determined that night that petitioner might have information about Fahey's whereabouts and questioned him. Police returned on Sunday afternoon and searched petitioner's house. A subsequent search found small spots of blood on a wall in the great room of the

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[1] The cooler was later found at sea by fisherman off the New Jersey coast. Pet. App. A48.

house. DNA testing of the blood spots, comparing them with blood Fahey had given to a blood bank, showed the spots to be a likely match to Fahey's blood. Federal authorities joined the investigation in the summer of 1996, and several individuals, including petitioner's brothers, appeared before a federal grand jury. In October 1997, federal agents executing a search warrant discovered illegal drugs and weapons in Gerry's house, and the following month, Gerry agreed to cooperate with authorities investigating Fahey's disappearance. Pet. App. A11-A12, A16.

3. Petitioner offered a radically different version of events. Testifying at trial, petitioner recounted that after dinner in Philadelphia, he and Fahey stopped at her apartment and from there went to his house to watch television, arriving shortly after 10:00 p.m. About an hour later, with Fahey still there, he spoke with MacIntyre and told her that she should not come to the house. A few minutes later, as he and Fahey sat in the great room, a very agitated MacIntyre walked into the room. Fahey began to put her pantyhose back on, telling petitioner that she wanted to leave. MacIntyre then produced a pistol and threatened to shoot herself. Petitioner explained that he grabbed MacIntyre's arm to prevent her from doing so, but MacIntyre accidentally fired the gun; the bullet hit Fahey behind her right ear, killing her instantly. Petitioner retrieved the pistol when MacIntyre dropped it, and petitioner sent MacIntyre on her way. He then cleaned up the blood and placed Fahey's body in the cooler. At that point, petitioner related, he went to Fahey's apartment and arranged it so as to appear that Fahey had been there. The next morning, he enlisted

Gerry's help in disposing of Fahey's body off the New Jersey coast. Pet. App. A17-A19.

4. Petitioner was arrested in November 1997, charged with first degree intentional murder,[2] and a state grand jury indicted him the following month. In January 1999, a jury found petitioner guilty as charged, and after a five day penalty hearing, the jury recommended that petitioner be sentenced to death. In March 1999, after considering the recommendation of the jury, the trial judge sentenced petitioner to death. Pet. App. A2-A3.

The Delaware Supreme Court affirmed. Rejecting petitioner's sixteen claims of error, the court decided, *inter alia*, that the trial judge had correctly denied petitioner's request that the jury be instructed on lesser included offenses. State law did not always preclude lesser included offense instructions when the defense was complete innocence,[3] but in petitioner's case, there was no rational basis in the evidence for convicting petitioner of a lesser degree of homicide:

> If the jury rejected the State's planning evidence, concluding, for example, that the cooler and the gun purchases were unrelated to Fahey, it could have returned a verdict acquitting the defendant. But, conviction on any other theory would require pure speculation by the jury concerning the manner of Fahey's death. . . .
>
> . . . Although there is evidence of the disposal of Fahey's body, the parties concede that apart from the accident defense offered in Capano's

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[2] Pet. App. D.

[3] Pet. App. A114-A117.

> testimony, there is no evidence concerning the *manner* of Fahey's death. Her body was not recovered and neither was any murder weapon. Putting aside Capano's accident defense, no one gave eyewitness testimony bearing on the circumstances under which Fahey died.

Pet. App. A119-A120 (emphasis in original). And petitioner's account of events did not, under state law, support a finding of recklessness or criminal negligence. Pet. App. A123-A124. Because there was no basis in state law to instruct the jury on lesser included offenses, this Court's decision in *Beck v. Alabama*, 447 U.S. 625 (1980) did not require, as a matter of federal law, otherwise. Pet. App. A125-A127.

Petitioner also contended that the decision of the Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) made his sentence invalid because the jury was not required to find the "facts" that increased the penalty from life imprisonment without parole to death. The state court disagreed, deciding that the rule announced in *Apprendi* was applicable only when the enhanced sentence actually exceeds the statutory maximum term prescribed for the charged offense. But a conviction of first degree murder authorizes the later imposition of the death penalty, this Court in *Jones v. United States*, 526 U.S. 227, 251 (1999), having made the point that " 'the finding of aggravating facts fall[s] within the traditional scope of capital sentencing as a choice between a greater and a lesser penalty, *not as a process of raising the ceiling of the sentencing range available.*' " Pet. App. A213. Because the finding of a statutory aggravating factor did not expose petitioner to a greater penalty than that authorized by the conviction,

Apprendi did not require reversal of the death sentence. Pet. App. A211-A215.

ARGUMENT

A. Constitutionality of Death Penalty Statute

In 1977, the state legislature enacted a capital punishment procedure, patterned after the Georgia statute approved in *Gregg v. Georgia*, 428 U.S. 153 (1976). *See Flamer v. State*, 490 A.2d 104, 121-22 (Del. 1983), *cert. denied*, 464 U.S. 865 (1983) and 474 U.S. 865 (1985). Under the statute, the jury was the sentencing authority, and a death sentence could be imposed only if the jury unanimously (1) found at least one statutory aggravating circumstance beyond a reasonable doubt and (2) recommended death after weighing the aggravating and mitigating evidence. *Flamer v. Delaware*, 68 F.3d 736, 741 (3d Cir. 1995), *cert. denied*, 516 U.S. 1088 (1996).[4]

In October 1991, the state legislature amended the statute, changing the sentencing procedure to one substantially identical to that used in Alabama and Florida.[5] *See generally Harris v. Alabama*, 513 U.S. 504 (1995); *Proffitt v. Florida*, 428 U.S. 242 (1976). Under the 1991 procedure, after the penalty hearing, the jury reports to the trial judge its findings as to the existence of statutory aggravating circumstances. The jury also advises the judge

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[4] Though the statute uses the term "weighing," Delaware is not a "weighing" state. *Flamer*, 68 F.3d at 745-49.

[5] The statute is reproduced in Pet. App. E.

whether, by a preponderance of the evidence, the statutory and non-statutory aggravating circumstances outweigh the mitigating circumstances. In making the report, the jury also discloses its vote on each question. The trial court, after considering the recommendation of the jury, is to decide the same questions. If the court concludes that the answer to both questions is in the affirmative, it must impose a sentence of death; otherwise, it must impose a sentence of life imprisonment without parole. *See Hameen v. State of Delaware*, 212 F.3d 226, 243-46 (3d Cir. 2000), *cert. denied*, 121 S. Ct. 1365 (2001); *Wright v. State*, 633 A.2d 329, 335 (Del. 1993).

Petitioner contends that under this procedure, his death sentence was imposed in violation of this Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). In *Apprendi*, the Court held that, as a matter of constitutional law, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. According to petitioner, the Delaware procedure improperly removes from the jury the determination of facts that increase the range of penalties to which a murder defendant is exposed. Pet. at 9-21. In *Ring v. Arizona*, *cert. granted*, 122 S. Ct. 865 (2002) (No. 01-488), this Court granted certiorari to decide whether *Walton v. Arizona*, 497 U.S. 639 (1990), approving a sentencing procedure similar in nature to that employed in Delaware, should be overruled in light of *Apprendi*. Accordingly, the Court should hold the petition in this case pending the decision in *Ring* and dispose of the petition as appropriate in light of that decision.

B. Lesser Included Offense Instructions

According to petitioner, the evidence warranted instructing the jury on several lesser included offenses, and he so asked the judge.[6] Beca ise the trial judge denied the defense request, petitioner a gued on appeal that his conviction was invalid under thi Court's decision in *Beck v. Alabama*, 447 U.S. 625 (1980). The Delaware Supreme Court correctly rejected that ar ument, and its decision does not conflict with any decisi on of this Court. Accordingly, further review is not wa ranted.

a. In *Beck*, the Court hel that a death sentence cannot be imposed after a jury v erdict of guilt of a capital offense, when the jury was no allowed to consider a lesser included non-capital offe nse and when the evidence would have supported su ch a verdict. 447 U.S. at 627, 642, 645. Two years later, the Court reiterated in *Hopper v. Evans*, 456 U.S. 605 (19 82), that lesser included instructions were only mandated when supported by the evidence. Conversely, if there is no lesser included offense, as the greater and lesse offenses are defined in state law, the defendant has no constitutional entitlement to a lesser included instruction. *Hopkins v. Reeves*, 524 U.S. 88 (1998); *Spaziano v. Florida*, 46 8 U.S. 447 (1984).

b. Petitioner does not sug gest that the Delaware court applied an incorrect lega l standard. Indeed, the standard for determining whe ther the jury must be

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[6] At one point, however, peti tioner had instructed his attorneys not to request any lesser included offense instructions. Tr. 17 (Jan. 7, 1999).

instructed as to a lesser included offense under Delaware law is identical to that employed by the federal courts. *Compare Keeble v. United States*, 412 U.S. 205, 208 (1973) *with Ward v. State*, 575 A.2d 1156, 1158-59 (Del. 1990) and Del. Code Ann. tit. 11, § 206(c) (Repl. 2001) ("The court is not obligated to charge the jury with respect to an included offense unless there is a rational basis in the evidence for a verdict acquitting the defendant of the offense charged and convicting the defendant of the included offense."). *See Hopper*, 456 U.S. at 611-12 (noting parallel between Alabama state law and federal standard). His complaint is that the court undervalued the evidence presented to the jury, and that evidence, which could have created a reasonable doubt as to the commission of the charged offense, was enough to require a lesser included instruction. Pet. at 25. Petitioner however simply conflates the two parts of the rule: it cannot be enough that the jury could acquit the defendant of the greater offense for, on that theory, every defendant would be entitled to a lesser included instruction. Instead, the defendant must "come forward with some evidence if he wishes to have the benefit of a lesser included offense instruction; while a judge cannot prevent a jury from rejecting the prosecution's entire case, he is not obligated to assist a jury in coming to an irrational conclusion of partial acceptance and partial rejection of the prosecution's case by giving a lesser-included offense instruction." *United States v. Cady*, 495 F.2d 742, 748 (8th Cir. 1974) (citing *Driscoll v. United States*, 356 F.2d 324, 327 (1st Cir. 1966), *vacated on other grounds sub nom. Piccioli v. United States*, 390 U.S. 202 (1968)). *See United States v. Moore*, 108 F.3d 270, 274 (10th Cir. 1997); *State v. Fowler*,

114 Wash. 2d 59, 67-68, 785 P.2d 808, 813-14 (1990). And the amount of evidence must be greater than a scintilla; the evidence must be sufficient to convict the defendant of the lesser offense. *Cf. Mathews v. United States*, 485 U.S. 58, 63 (1988) (entrapment); *United States v. Branch*, 91 F.3d 699, 712-13 (5th Cir. 1996), *cert. denied*, 520 U.S. 1185 (1997) (self-defense). Petitioner's jury could easily have discounted the prosecution's evidence that he caused Fahey's death intentionally, but there was no evidence from which the jury could reasonably decide that petitioner had acted in either a reckless or criminally negligent manner. Petitioner's contention otherwise is little more than a request that this Court undertake its own review of the exhaustive trial record, a request that is singularly inappropriate for the Court's exercise of its certiorari jurisdiction. *Yee v. City of Escondido*, 503 U.S. 519, 536 (1992); *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 176 n.8 (1981); *Rudolph v. United States*, 370 U.S. 269, 270 (1962). *See Anderson v. Bessemer City*, 470 U.S. 564, 574-75 (1985). Further consideration of the question is thus unwarranted.

CONCLUSION

The petition for a writ of certiorari should be held, for purposes of the first question presented, pending the decision in *Ring v. Arizona* and disposed of as appropriate in light of that decision. In all other respects, the petition should be denied.

Respectfully submitted,

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